

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In re Application of |) | |
| |) | |
| Stop 26 Riverbend, Inc. |) | |
| (Assignor) |) | |
| |) | |
| and |) | |
| |) | |
| Citicasters Co. |) | |
| (Assignee) |) | |
| |) | |
| For Consent to the Assignment of License |) | File No. BALH-19990816GE |
| of WRBP(FM), Hubbard, Ohio |) | |

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 2003

Released: October 23, 2003

By the Commission:

1. The Commission has before it a February 22, 2001, Application for Review filed by Citicasters Co. ("Citicasters") and a March 9, 2001, Opposition filed by Stop 26 Riverbend, Inc. ("Stop 26") concerning the above-captioned application to assign the license of station WRBP(FM), Hubbard, Ohio, from Stop 26 to Citicasters. The staff dismissed the assignment application on September 7, 2000, at Stop 26's request and over Citicasters' objection.¹ Citicasters timely filed a petition for reconsideration on October 12, 2000, which the staff denied on January 18, 2001.² Citicasters argues in its Application for Review that the staff's action conflicts with Commission policy³ and that, therefore, the Commission should reinstate the assignment application to pending status *nunc pro tunc*. For the reasons discussed below, we deny the Application for Review.

2. The sole issue on review is whether the Commission's staff must keep an application in pending status when the parties have an ongoing dispute in court and one party requests dismissal and is no longer willing to proceed with the transaction. Stop 26 is no longer willing to assign WRBP(FM) to Citicasters. Stop 26 states that the staff's dismissal of the assignment application is consistent with the Commission's policy of deferring to local and state court authority on contractual matters. It argues that the dismissal neither forecloses any legal remedies that Citicasters may pursue through litigation, nor deprives Citicasters of the opportunity to refile the assignment application in the event that a court mandates such relief. Citicasters, however, contends that dismissal of the assignment application "contradicts established Commission policy to accommodate local court adjudication of contractual

¹ See *Letter to Percy Squire, Esq.*, Ref. No. 1800B3-AB (MMB Sept. 7, 2000). At that time, the station's call sign was WBTJ(FM).

² See *Letter to Marissa G. Repp, Esq.*, Ref. No. 1800B3-JR (MMB Jan. 18, 2001).

³ See 47 C.F.R. § 1.115(b)(2)(i).

disputes” while retaining its exclusive jurisdiction over licensing matters.⁴ Citicasters argues that when a private contractual matter is properly before a local court, as in this instance, “the Commission should not prejudice one litigant at the request of the other.”⁵ It argues that, by dismissing the assignment application, the Commission prejudices Citicasters, whereas by keeping the application pending the Commission would maintain neutrality during the litigation. Specifically, Citicasters states that if it were required to resubmit its application following a favorable court decision, there would be a new filing fee, a new 30-day public notice period and, potentially, the consideration of any petitions to deny filed during that period. According to Citicasters, the Commission’s decision in *Arecibo Radio Corp.*⁶ -- a case that the staff cited in granting Stop 26’s request for dismissal of the assignment application -- is in fact favorable to Citicasters’ position. It maintains that *Arecibo Radio* requires the Commission to process an assignment application even if not supported by all the parties. Citicasters also relies on *Northwest Broadcasting, Inc.*⁷ for the proposition that the Commission can grant applications despite contractual disputes.

3. On December 27, 2002, the court approved an “Agreed Judgment” submitted jointly by Stop 26 and Citicasters.⁸ The Agreed Judgment states that: (1) Stop 26 breached the sales contract; (2) despite the breach, the contract has not been terminated and remains in effect; and (3) Citicasters is entitled to judgment against Stop 26 and other defendants in the amount of \$3 million. The Agreed Judgment requires payment of the damages to Citicasters in May 2003. Citicasters has since indicated, however, that the contractual matter remains unresolved and that it has no immediate plans to withdraw the Application for Review.⁹ Thus, we proceed with our review.

4. We conclude that the staff properly dismissed the assignment application. The Commission routinely dismisses voluntary assignment of license applications at the request of a buyer or seller.¹⁰ This avoids the expenditure of limited Commission resources on hypothetical or speculative proposals. The assignment applications in *Arecibo Radio* were filed after a court adjudicated a breach of contract suit and

⁴ Application for Review at 2.

⁵ *Id.* at 5.

⁶ *Arecibo Radio Corp.*, 101 F.C.2d 545 (1985) (“*Arecibo Radio*”).

⁷ Application for Review at 5 citing *Northwest Broadcasting, Inc.*, 12 FCC Rcd 3289 (1997) (“*Northwest Broadcasting*”) *aff’d sub nom. Montierth v. FCC*, 159 F.3d 636 (D.C. Cir. 1998) (per curiam) (Commission historically and consistently has left questions of private contracts to local courts of appropriate jurisdiction).

⁸ Agreed Judgment, *Citicasters Co. v. Stop 26 Riverbend, Inc., et al.*, (Ct. Com. Pl., Hamilton County, OH Dec. 27, 2002) (Case No. A 0004111) (“Agreed Judgment”). See *Letter from Marissa Repp to the Commission*, dated August 22, 2003 (attaching a copy of the Agreed Judgment).

⁹ See *Letter from Marissa Repp to the Commission*, dated August 22, 2003.

¹⁰ See, e.g., *Public Notice, AM Station Applications for Assignment of License Dismissed*, Report No. 45508 (June 17, 2003) (application for voluntary assignment of license of WULA, Eufaula, AL dismissed per request of assignor); *Public Notice, AM Station Applications for Assignment of License Dismissed*, Report No. 45050 (Aug. 16, 2001) (application for voluntary assignment of license of KZXX, Kenai, AK dismissed at request of assignee); *Public Notice, FM Station Applications for Assignment of License Dismissed*, Report No. 44840 (Oct. 16, 2000) (application for voluntary assignment of license of WMSK-FM, Morganfield, KY dismissed per assignor’s request).

ordered the parties to proceed with the assignment of station licenses. The licensee refused to sign the assignment applications, so the court ordered its Marshall to sign the applications on behalf of the licensee.¹¹ The Commission's denial of the licensee's request to dismiss the assignment applications in *Arecibo Radio* was based on the fact that the applications were submitted at the court's directive, a factor not present here. In short, in *Arecibo Radio*, there were two legally empowered, consenting parties.

5. Citicasters' reliance on *Northwest Broadcasting* is also misplaced. In *Northwest Broadcasting*, the Commission affirmed the staff's grant of two assignment applications as sought by related assignors and related assignees and denied an application for review. Petitioners had sought reversals of the grants based on their claim of majority shareholder interests in the assignors and their contention that the assignors acted without corporate authority. As there was only a partial judgment issued by a state court in the contract litigation, the Commission affirmed the staff's grant of the assignment applications "with the condition that [its] action [was] without prejudice to whatever further action, if any, may be appropriate upon a final [court] ruling"¹² *Northwest Broadcasting* stands for the proposition that willing parties may proceed with a transaction while litigation is pending.¹³ It does not establish that the Commission will require an unwilling buyer or seller to proceed absent a court order.

6. Citicasters has failed to demonstrate that its remedies under the law are inadequate. The staff action fully accords with the Commission's longstanding policy to defer to state and local courts on private contractual matters while retaining exclusive jurisdiction over broadcast station licensing.¹⁴ We find that there would be no significant prejudice to Citicasters in the event that resolution of the dispute in court results in the parties refiling a WRBP(FM) assignment application.¹⁵

7. Accordingly, IT IS ORDERED that the Application for Review filed by Citicasters Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

¹¹ *Arecibo Radio*, 101 F.C.C.2d at 547.

¹² *Northwest Broadcasting*, 12 FCC Rcd at 3296-97.

¹³ *Id.* at 3296.

¹⁴ See *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing "the Commission's longstanding policy of refusing to adjudicate private contract law questions"); *Arecibo Radio*, 101 F.C.C.2d at 548; *John F. Runner, Receiver*, 36 RR 2d 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

¹⁵ In the event that the parties refile an assignment application for WRBP(FM), a fee would ordinarily apply. Applicants may, however, file an accompanying petition for waiver of the application filing fee with the Commission's Office of the Managing Director. See 47 U.S.C. § 158(d)(2); 47 C.F.R. §§ 1.1113, 1.1117. See, e.g., *Public Notice, Fee Decisions of the Managing Director Available to the Public*, 18 FCC Rcd 10502 (OMD May 22, 2003).

Secretary